

NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY : CIVIL TERM : PART 54

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LISA MAYER, DEBRA MAYER, DABA, INC. and ABA, INC.,

Plaintiffs,

-against-

ALBERTO VILAR, GARY TANAKA, AMERINDO INVESTMENT ADVISORS,  
INC. (U.S.), AMERINDO INVESTMENT ADVISORS, INC. (PANAMA),

Defendants.

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Index No. 603234/2004

New York Supreme Court  
60 Centre Street  
New York, New York 10007  
April 1, 2014

B E F O R E: HON. SHIRLEY WERNER KORNREICH  
Supreme Court Justice

A P P E A R A N C E S:

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A P P E A R A N C E S: (Continued)

VIVIAN, SHEVITZ, ESQ.  
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Lori Ann Sacco  
Official Court Reporter

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2 THE COURT: You may be seated. What is in  
3 front of me is somewhat of a mess. What it is, is a  
4 case which began long ago, and it involves funds  
5 which were invested with Mr. Volar and Amerindo just  
6 to make things easier. And they were invested  
7 beginning in the '80s really and continued through  
8 2005, although the Mayers, which are two sisters and  
9 the father, the two sisters had inherited quite a bit  
10 of money, and they invested over a \$11 million, and  
11 to be exact, in January of '01, because this was a  
12 continuous investment. They invested \$11,066,713.44  
13 with Vilar and Tanaka in their investment fund I  
14 guess it is. It was guaranteed by the defendants,  
15 Vilar and Tanaka and their fund, and it was to pay  
16 11 percent interest.

17 There was -- When they demanded their money,  
18 there was a default, and it was supposedly invested  
19 for three years. When the investment was up again,  
20 there was a default. They didn't receive, I don't  
21 believe, the full interest and they certainly didn't  
22 receive their money back.

23 Subsequently, Mr. Vilar and Mr. Tanaka were  
24 prosecuted by Federal Government for violations of  
25 the SEC and other criminal conduct and eventually  
26 convicted. The monies that these men had were frozen

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2 by the government, by the Federal Government.

3 The Mayers had no money allegedly and were --  
4 were in desperate need of money allegedly. They at  
5 some point got \$150,000 of their money from the  
6 government, but basically were unsuccessful in  
7 getting their monies.

8 This case, the case in front of me, is  
9 seeking to obtain what was theirs, was stayed pending  
10 the criminal prosecution. I believe that the  
11 criminal prosecution ended some time in 2010 I think  
12 it was. Was it?

13 MR. BEGOS: It was to the end of the criminal  
14 trial, which was fall of 2000 -- yeah, I think it was  
15 2010.

16 THE COURT: Right. And basically the Mayers  
17 moved in front of me for a judgment. According to  
18 all the papers, their motion for summary judgment, I  
19 believe it was summary judgment, was served on both  
20 Vilar and Tanaka, who at that point were in prison.  
21 There was -- Mr. Tanaka at some point had been  
22 fighting the case, but eventually the summary  
23 judgment was not opposed. And this Court issued a  
24 judgment in favor of the Mayers.

25 In issuing the judgment -- Let me look at it  
26 to make it clear. The Court didn't give the Mayers

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2 everything they wished for. Instead what the Court  
3 did is it awarded them an amount of money admitted to  
4 be owed to them by the defendants in a letter from  
5 the defendants' investment firm. And that amount of  
6 money, I believe, was as of June of 2004, and it was  
7 for \$11,000,224 -- 200 -- Strike that --  
8 \$11,224,936.46. Now, this was an amount that the  
9 fund said it owed, and I believe that was in June of  
10 2004.

11 So, rather than award what the Mayers were  
12 requesting, which was some \$750,000 more, the Court  
13 awarded what it viewed as an admission. And so when  
14 it awarded that amount of money, it also found that  
15 there were other claims for dealing with two other  
16 funds. And that went forward as well. But in terms  
17 of that judgment, it was that 11 million, which was  
18 the admission.

19 And then the Court also awarded interest and  
20 found a violation of GBL 349, and awarded attorneys'  
21 fees as well. But the interest was the nine percent  
22 interest, and the Court did award it from  
23 January 1st, 2004. There is a question whether that  
24 was appropriate at this point. And at this point  
25 there is a motion to renew and reargue, and it's  
26 quite -- quite -- Reargument, of course, is not even

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2 part of this. It's to renew, because it's so far  
3 along after the judgment was awarded. The judgment  
4 was awarded back in August of 2011.

5 So, at this point there is a motion to renew  
6 and it -- it argues that the amount of money itself  
7 was not right. Was the wrong amount of money. It  
8 should have been less certain payments that allegedly  
9 were made to the Mayers in 2004 and also \$150,000  
10 that was awarded by the Federal Court to the Mayers.

11 Now, certainly the \$150,000 had been before  
12 the Court prior in the Mayers' affidavits and in the  
13 information as well as some of the payments. I'm not  
14 sure if all of the payments were there or not. And  
15 it was viewed as interest payments, because the Court  
16 did not award any interest, certainly not at  
17 11 percent, which was part of what was promised prior  
18 to the June 2004 admission of 11/22/04. But it did  
19 award the nine percent from 2004 onward.

20 I think there is argument now that the  
21 interest should not be awarded after some time in  
22 2005, since the monies were frozen by the Federal  
23 Government. And I'm not quite -- I don't quite  
24 understand. They were put into an escrow account  
25 with JP Morgan, and apparently not in an interest  
26 bearing account from what I -- I don't understand

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2 that. And I also wonder if JP Morgan was receiving  
3 escrow fees and yet -- because I assume as an escrow  
4 agent they may well have been. I'm not sure. I  
5 would like to know. Also was the money segregated.  
6 Was JP Morgan using the money. If they were using  
7 the money, why weren't they paying interest fees. I  
8 mean, all of these are questions that I'm curious  
9 about. And also my first instinct at this point is  
10 to contact Judge Sullivan, the federal district, who  
11 has this case and speak to him about it. Only I've  
12 not done it because I would like to discuss my doing  
13 that with counsel in front of me before I reach out  
14 to him.

15 So, I have a lot of questions. I'll allow  
16 you to argue. And since this is the motion of  
17 Mr. Vilar and Mr. Tanaka, my assumption is Mr. Tanaka  
18 is not here, is that correct?

19 MS. SHEVITZ: I'm Vivian Shevitz. I am  
20 helping Mr. Tanaka. I represent him in the SEC case,  
21 and I represent Mr. Vilar in the criminal case and  
22 also in the SEC case. I have not appeared for  
23 Mr. Tanaka, because I've appeared in many cases for  
24 no fees, and I just can't do it in another case.  
25 I'll be glad to assist the Court. I'll be glad to  
26 e-file, but I really can't appear in another case.

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THE COURT: Well, I understand that. So basically since you're not appearing, why don't you have a seat in the audience. And there is someone here for Mr. Vilar, I assume.

MR. BURGER: Yes, your Honor.

THE COURT: You represent Mr. Vilar. And Mr. Vilar is asking for the same relief in a sense as Mr. Tanaka, although Mr. Tanaka's papers were certainly more informative. But let me hear from you.

MR. BURGER: Okay, your Honor.

THE COURT: It's your motion.

MR. BURGER: Yes. Thank you, your Honor. The amount that you referenced was actually in the August 2004 statement of account which was --

THE COURT: It was August not June.

MR. BURGER: Yes. And that was referenced in the moving affidavit of Lisa Mayer, paragraph 25.

THE COURT: It was a letter. The reason I say June is there was a letter from Amerindo. I'm not looking at an affidavit, because to me that's hearsay as to what went on. I was looking at the letter from Amerindo, which is an admission in this Court's mind as to what Amerindo owes. That's what I gave, because I viewed it as -- as Amerindo or



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2 Mr. Vilar's and Mr. Tanaka's admission. It was  
3 written and signed by Mrs. Tanaka, who worked with  
4 them on Amerindo letter, on their investment  
5 company's letterhead.

6 MR. BURGER: I'm not disputing the amount of  
7 that statement, your Honor.

8 THE COURT: No. I'm just saying that letter,  
9 from what I recall, was dated June. And whether or  
10 not Ms. Mayer says that it's as of August, I'm paying  
11 no attention to what she says in her affidavit. I  
12 base this upon the letter itself, which I view as an  
13 admission.

14 MR. BURGER: The following paragraph in that  
15 affidavit referenced a \$150,000 payment that your  
16 Honor has mentioned. It also referenced a million  
17 dollars in payments, which were undocumented.

18 Now, the reason this motion was filed at this  
19 time is that the SEC filed an affidavit with  
20 statements indicating \$1,310,728.74, nine separate  
21 payments that were made to the Mayers between  
22 January 2004 and January 2005. Those amounts were  
23 not before your Honor.

24 THE COURT: Well, over a million was. It  
25 wasn't the same amount, but it was a million and  
26 something. And that was -- I think that was stated

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to be interest. I'm not sure.

MR. BURGER: But, your Honor, that amount did not reduce the amount on the statement.

THE COURT: No, because the Court viewed it as interest, as interest payments on the principal. And the admission was what was in the account at that point, as principal in June of 2004. But, you know, frankly I have questions, and that's -- and that's my problem. That's why I wanted to reach out to Judge Sullivan. I don't know from the papers -- Let me step back.

From the papers it looks like there are three women, because apparently they're all friends. They seem to be the investors. There seems to be three investors. Let me look exactly. One, I believe, one was Cates. There are three investors that are still owed money. Are there others? I would like to know who -- who are the quote unquote victims here. According to these papers there are just three. Are there more?

MR. BURGER: They are in the SEC action, your Honor. There is now a procedure whereby a receiver has been appointed, who has been communicating with all --

THE COURT: And being paid, although nothing

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has gone out in all of these years to the victims.

MR. BURGER: That's right.

THE COURT: So, these victims, and I view them as victims, have not seen a penny for years and years, but the receiver is making sure he is being paid but not issuing any monies to anybody. But let's continue.

MR. BURGER: The receiver that's currently appointed was just appointed several months ago. So he --

THE COURT: He's already gotten 50,000 and he's asking for more. Am I correct?

MR. BURGER: I believe that's correct, your Honor.

THE COURT: Go ahead.

MR. BURGER: And I cannot explain why the money has been without interest all of these years.

THE COURT: Can you tell me, do you know how many people are claiming against the fund?

MR. BURGER: I believe it's something on the order of 30.

MS. SHEVITZ: May I confer with Mr. Begos?

THE COURT: Yes, if you know.

MR. BEGOS: It's about 30, your Honor.

THE COURT: So, there are 30?

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MR. BURGER: Approximately.

THE COURT: How much money is being claimed?

MR. BEGOS: It's unclear. Do you want me to answer that?

THE COURT: How can it be unclear after all these years?

MR. BEGOS: Well, what the receiver --

THE COURT: What is the receiver doing for his money?

MR. BEGOS: There are different methods of calculating what people are owed in different forums. The method that the receiver has requested Judge Sullivan to approve for an interim distribution of something like \$20 million is what he called a pooled investment approach, which sort of recalculates everybody at a somewhat minimal level and distributes something to each of them.

THE COURT: Oh, its bankruptcy now.

MR. BEGOS: Well, it's -- it's a receivership which is, in some respects, like a bankruptcy.

THE COURT: Right. Bankruptcy, the only people that make out well are the lawyers. It looks like that might happen here as well.

MR. BEGOS: Well, we're hoping --

THE COURT: And the debtors usually -- It's

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like robbery without a gun.

MR. BEGOS: We're hoping that -- that Judge Sullivan will be ordering the interim distribution of this \$19 million any day now.

THE COURT: So, how much is there in this pool?

MR. BEGOS: There is at least the \$19 million. That's largely the cash that was in several of these accounts. There are also a number of -- a large number of what the receiver has described as restricted publically traded stocks, which he thinks are valued at something like 40 to \$50 million. But work has to be done before they could be sold, because they were various restrictions on the stock.

THE COURT: So, there isn't just 19 million.

MR. BEGOS: No.

THE COURT: From what you've said there is like 59 million.

MR. BEGOS: Nobody really knows for sure. There may be more, because there is also what have been referred to as private securities, some of which may have been subject to mergers or acquisitions. Some of which may be valuable. Some of which are not.

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THE COURT: Where is all of this money?

MR. BEGOS: It's at JP Morgan.

THE COURT: Including the 40 million that you were talking about?

MR. BEGOS: Yes.

THE COURT: And what has JP Morgan been doing with this money?

MR. BEGOS: Essentially nothing. It was --

THE COURT: Well, what I want to know, because usually a bank -- Money is fungible. Usually the money is in the hands of the bank and they use it.

Now, is this money segregated in some way so it is not being used by JP Morgan?

MR. BEGOS: Primarily it's not in an escrow account or anything like that.

THE COURT: So why -- And it's not in an escrow account segregated?

MR. BEGOS: No.

THE COURT: So, JP Morgan has been using the money?

MR. BEGOS: I believe so.

THE COURT: And they haven't been paying interest on the money?

MR. BEGOS: What JP Morgan --

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THE COURT: Well, have they been paying interest?

MR. BEGOS: They say they paid interest through, I think, 2008. They say that under their account agreements, the interest that would accrue on these accounts was something like -- I don't know if it was liable or prime, but some market rate less a half a point. And they say that in 2008 or 2009, I forget the exact year, the target rate was below half a point. So, effectively no interest was earned. That's what they say. I haven't verified that.

THE COURT: I'm wondering if they have \$20 million from anyone, whether that's the rate they pay, nothing.

MR. BEGOS: Your Honor, I agree with you.

THE COURT: It is rare in the commercial -- in a commercial setting for a bank that has \$20 million or anyone that has \$20 million at its disposal not to pay anything number one.

MR. BEGOS: I agree.

THE COURT: Number two, were they taking escrow fees?

MR. BEGOS: They, to my knowledge, they have claimed through the receiver that they are entitled to certain custodial fees. I don't know whether --

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how far back those fees go.

THE COURT: Have they taken any fees?

MR. BEGOS: I do not know if they have deducted any fees.

THE COURT: I would like to know all of this. Do they have the 20 million or do they have all 59 million.

MR. BEGOS: Well, they have all of the money and assets that the receiver knows of and has in hand, I believe, are at JP Morgan. There are a couple of other accounts which are supposedly in other places that the receiver is trying to get ahold of. There is a lot of assets that were nominally placed under the receiver's control, like race horses owned by Mr. Tanaka, that to my knowledge the receiver hasn't gathered.

THE COURT: If these are race horses from early 2000, they are pretty old race horses at this point.

MR. BEGOS: I wanted to be as accurate as I can be in the answer, your Honor. The vast majority of the money that we're talking about in the receivership is in a couple of accounts at JP Morgan Chase in the names of various entities that Vilar and Tanaka set up.



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2 THE COURT: See, and how much is claimed,  
3 that's what I would like to know, by these 30 alleged  
4 people approximately.

5 MR. BEGOS: Well, it's hard to say. I think  
6 the receiver, in his motion for approval of his  
7 proposed interim distribution, has -- has counted all  
8 the claims on a reduced basis at something like  
9 \$40 million or \$47 million. But that doesn't  
10 include -- That stops the accounting in 2005, when  
11 Vilar and Tanaka were arrested. It reduces people's  
12 claims.

13 THE COURT: In what way? I mean, I would  
14 like to see what the receiver has done. I need a lot  
15 more facts. I can't make a decision on this.

16 MR. BEGOS: Well, your Honor, we think  
17 that -- I certainly am willing to answer the Court's  
18 questions. As it relates to this particular motion,  
19 I don't think the receiver's proceedings relate to  
20 that.

21 THE COURT: Let me just say this. You know,  
22 I make mistakes. And frankly, as far as I'm  
23 concerned, and the one thing I think that the  
24 bankruptcy judges do absolutely right is not to grant  
25 priorities, and I am not going to grant the Mayers a  
26 priority over other quote unquote victims. So, you

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2 know, if we're talking about the interest payments,  
3 to me that is still -- that is an issue. And whether  
4 or not I had all the facts in front of me at the time  
5 is an issue.

6 MR. BEGOS: Your Honor, if I --

7 THE COURT: I may well have made a mistake.  
8 Now, in terms of the monies they were owed and the  
9 principal that they were owed, and I still view it as  
10 an admission as of June of 2004, the 11 million 220,  
11 whatever it is, I believe that as of June of 2004  
12 that is the money, that is the principal that  
13 Amerindo said they had. And I will not vacate that  
14 judgment as of June. Now there may have been  
15 payments after June of 2004. I don't know. I need  
16 more information. The interest, that's up in the air  
17 depending upon what, you know, what the other victims  
18 are owed. And frankly, you know, I -- I just need  
19 more information. I would like to ask you whether I  
20 can call Judge Sullivan to get some information.

21 MR. BEGOS: Your Honor, if I can address the  
22 interest question for a moment. The so called  
23 evidence that Mr. Vilar and Mr. Tanaka have submitted  
24 to you, it doesn't rise to the level that's necessary  
25 to vacate the judgment for several reasons. Number  
26 one, as your Honor has noted, the Mayers did disclose

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interest payments in the summary judgment motion.

THE COURT: Different amounts.

MR. BEGOS: Different amounts. There was no opposition to that by Mr. Vilar or Mr. Tanaka.

THE COURT: There is an issue raised by Mr. Tanaka of whether or not he was, in fact, served.

MR. BEGOS: I understand there is an issue raised by Mr. Tanaka on that. We submit that he was properly served.

THE COURT: I don't know.

MR. BEGOS: Your Honor, Mr. Vilar was represented. Mr. Burger was here when we argued the summary judgment motion. Payment is an affirmative defense. Neither defendant pleaded payment as an affirmative defense. Neither defendant took discovery. And these defendants are arguing two years after judgment entered that interest that was paid by their own companies was something that they were unaware of until two years later.

One more point, if I may. If you look at the affidavit that the SEC attorney filed, some of the exhibits -- that's attached as an exhibit to Mr. Burger's affidavit.

THE COURT: Yes.

MR. BEGOS: About half of the documents don't

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on their face reveal any payments to the Mayers. So,  
if you look, this is all exhibit -- it's Exhibit F.  
It's Exhibit F to the -- to the Jacobson affidavit.

THE COURT: Oh, it's not this one.

MR. BEGOS: It's -- Jacobson is attached as  
an exhibit to the Burger affidavit. It's Exhibit 2,  
Exhibit 2 to the Burger affidavit.

MR. BURGER: Actually it's Exhibit F.

THE COURT: Wait a minute.

MR. BEGOS: Let me see.

MR. BURGER: Exhibit F are a series of  
statements and --

THE COURT: I don't see it. I have --

MR. BURGER: If you have my affidavit  
attached to the Notice of Motion, your Honor.

THE COURT: I have -- Wait a second. The  
Begos affidavit are you talking about?

MR. BURGER: No. David Burger.

THE COURT: The problem is the Begos  
affidavit does have, which is nice, tabs that I can  
use. I don't see them under any of the others  
because --

MR. BURGER: Mine has tabs, your Honor.

THE COURT: I don't have it then, because I  
had to download a lot of it. Certainly what I have

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doesn't have tabs.

MR. BURGER: May I read this into the record and hand it up to your Honor?

THE COURT: Oh, I do have it. You're right. I'm sorry. Your exhibit which --

MR. BURGER: If you turn to Exhibit 2 at the bottom.

THE COURT: Yes, that's the Jacobson.

MR. BURGER: The Jacobson declaration.

THE COURT: Right.

MR. BURGER: If you turn several pages in, there is Exhibit --

THE COURT: You see also --

MR. BURGER: -- F.

THE COURT: -- this is what I had read what was owed to the Lily Cates, the Mayers and Tara Colburn. Lilly Cates is a little under 5 million. Colburn, it's about -- a little under half a million and even according to you it's about 9.6 million to Mayers.

MR. BURGER: Yes, your Honor.

THE COURT: There is nothing else in any of the others, any other victims.

MR. BURGER: Exhibit F, your Honor, the first statement states for further credit to Lisa, Deborah

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Mayer.

THE COURT: Yes, I understand. But what I was trying to explain to you, the date of this is January 23rd of 2004.

MR. BURGER: Yes.

THE COURT: Now, that one I wouldn't consider at all, because as of June of 2004, there is a statement from the investment company itself saying that over 11 million is owed, 11.2 million, a little more than that is owed in principal.

MR. BURGER: The next one, your Honor, is June 23rd.

THE COURT: Yes. I have to look at the letter to see if that's before or after.

MR. BEGOS: Your Honor, I think the letter you're referring to, the letter was dated in August of 2004.

THE COURT: Wait a minute. I'm looking for the letter now, because I did read it. I thought it was a June date, but I may be wrong.

MR. BEGOS: It enclosed a statement, I believe that was as of June of 2004. I think the cover letter was August of 2004.

THE COURT: Right. It was a June date.

MR. BEGOS: Correct.

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THE COURT: I don't remember if it was the end of June, beginning of June. I'm not sure. But that was what I used --

MR. BEGOS: Correct.

THE COURT: -- in terms of the judgment. Because it seemed to me to be an admission.

MR. BURGER: The further statements, your Honor, there is 150,000 paid on September 7th, 2004. An additional payment of \$100,000 on the same day. Additional payment of 100,000 on October 15th, 2012.

MR. BEGOS: Actually that one doesn't mention the Mayers at all, that October 15th letter that Mr. Burger is referring to. All of the subsequent letters don't mention the Mayers.

THE COURT: It's -- Well, it mentions a bank.

MR. BEGOS: It mentions a bank. It doesn't mention the Mayers.

THE COURT: It doesn't say -- Wait a minute. Which one are you talking about?

MR. BEGOS: As of October 15th, 2004, and all of the subsequent ones.

THE COURT: I'm looking at the dates.

MR. BEGOS: It's on the very top. It's -- There is a bates number. It's AUK-6-01903.

THE COURT: Yeah. It says -- It's the same

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bank and the same account number, so I don't think it matters.

MR. BEGOS: It doesn't say that they're for the payment to the Mayers.

THE COURT: It's the same account and the same bank. I'm not going to ignore that.

MR. BEGOS: And that document and subsequent documents were signed by Gary Tanaka. So, for him to claim that he was unaware of the interest payments until two years after the judgment was entered is ridiculous.

THE COURT: Well, that's another issue, whether the interest payments are something other, which is what they raise. I'm not sure.

MR. BEGOS: I will point out, your Honor, that the motion --

THE COURT: Even if they are interest payments, then why should they get double interest?

MR. BEGOS: Well because, as your Honor pointed out -- Well, there is really two answers. One the Court will recall that both defendants based this motion on a false assertion that the Mayers didn't disclose anything to the Court about interest payments received after January 2004. We pointed out that was entirely false, that the Mayers had



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2 disclosed about a million dollars in interest  
3 payments after January 2004 as the Court noted.

4 Secondly, as the Court pointed out in fashion  
5 of the summary judgment decision, the Court used the  
6 admitted statement. Didn't credit the Mayers with  
7 interest that had been due but unpaid before that  
8 date, which the Mayers submitted evidence of and the  
9 defendants didn't challenge. And also didn't deduct  
10 the interest that the Mayers said had been paid after  
11 2004.

12 So, in fact, what -- what the summary  
13 judgment decision essentially was, was more or less a  
14 wash as far as the interest payments were concerned.

15 THE COURT: Well, it was done -- It was a  
16 default in a sense. It was a summary judgment on  
17 default, that's why I used -- what I thought was an  
18 admission. However, I do think if one makes a motion  
19 on default, whatever is said by the claimant has to  
20 be the truth.

21 MR. BEGOS: And it was.

22 THE COURT: And if there is anything in there  
23 that is shown not to be true, then the Court has been  
24 misled. And it's not just a matter of an affirmative  
25 defense. It's more.

26 MR. BEGOS: We stand by the statements and --

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2 THE COURT: I think I was trying -- I think I  
3 was trying -- I was too hasty partly because the  
4 Mayers had not seen any of their money for many  
5 years. The money was being frozen, and the Feds were  
6 doing nothing about it other than -- and it looked to  
7 some degree like it might be somewhat of a feeding  
8 feast by JP Morgan, by the receiver, by everybody  
9 else. But I'm not sure that's the case. And I may  
10 have been hasty in my judgment. And at this point  
11 I'm not willing to be hasty again and to make a  
12 decision without knowing the facts. I just need more  
13 facts. If I need to have a hearing, I'll have a  
14 hearing. But I don't feel that I know enough to make  
15 a decision on this.

16 MR. BURGER: And to answer your prior  
17 question, your Honor, we certainly would have no  
18 objection to you contacting Judge Sullivan.

19 THE COURT: How about you?

20 MR. BEGOS: Nor would I. Nor would I.

21 THE COURT: I think I will contact Judge  
22 Sullivan to see if I could get more -- if I could get  
23 perhaps the receiver's report and find out where the  
24 federal action stands.

25 MR. BEGOS: Your Honor, we're happy to submit  
26 the receiver's report. There is actually --

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THE COURT: I would appreciate it.

MR. BEGOS: There is two motions that the receiver made. He made a motion -- I mean, there are several reports. I think what your Honor really is looking for is there is a motion that he made to approve an interim distribution that laid out what he viewed as people's claims and how he calculated them.

THE COURT: Really, I don't care about what his view was. What I care about is how much money is being held at this point and how much money is claimed. And what I would like to know is how much money was claimed as of the date of arrest in 2005 by each of these investors.

MR. BEGOS: We can certainly get you -- The volume of information that the receiver collected is pretty extensive. What he did was engage in a claim submission process where he invited the world to submit claims and evidence of their statements, which the Mayers submitted and various other investors submitted. So I know I have looked at that. There is several redwelds worth of files submitted by various investors.

THE COURT: I assume that the receiver digested this and said X claims so much, you know, what each one claims.

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MR. BEGOS: Yes. Yes, but he did it for purposes of this interim distribution. So, what --

THE COURT: Didn't he look at the Amerindo records to see how much was in the Amerindo accounts?

MR. BEGOS: Apparently -- Well, what was in the Amerindo accounts was what was in the JP Morgan accounts.

THE COURT: What I'm trying to say is Amerindo apparently kept records.

MR. BEGOS: We don't know how good the records are. As far as I know, the receiver didn't attempt to audit the Amerindo records.

THE COURT: Then what did he do? To me what is the receiver doing? Why is he being paid?

MR. BEGOS: Your Honor, I'm not here to defend the receiver.

THE COURT: I certainly hope you're not.

MR. BEGOS: I'm trying to answer the Court's question.

THE COURT: The way to do it is not to say to the world who is owed any money. The way to do is to look at the records and do some kind of accounting. If the receiver is incapable of it, he shouldn't be paid.

MR. BURGER: If I may, Mr. Vilar and Tanaka

1  
2 have offered to assist the receiver, and that has  
3 been refused.

4 THE COURT: Well, I don't know. I'm not  
5 going to go there. But what I do -- don't understand  
6 is all of the records were seized by the Feds when  
7 Mr. Tanaka and Mr. Vilar were arrested in 2005.  
8 Those were the records the receiver should have  
9 looked at and done an accounting of to find out how  
10 much is owed. If the receiver has not done this,  
11 then the receiver has not done his job.

12 MR. BURGER: What the receiver has apparently  
13 done is sent out letters to the investors asking them  
14 what they think they invested in.

15 THE COURT: This isn't a class action. He's  
16 acting as if this is a class action. It's not what  
17 it is.

18 MR. BEGOS: It's a bizarre proceeding, your  
19 Honor. We disagree with a lot of what the receiver  
20 is proposing, but what the -- unfortunately for us,  
21 what the second circuit law says is that as long as  
22 what the receiver is proposing is quote unquote "fair  
23 and equitable to victims who are similarly situated",  
24 whatever that means, then the proposed distribution,  
25 if approved by the Court, is within the Court's  
26 discretion. I don't agree with that, but that's what

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2 the law says. And --

3 THE COURT: You know, to me it seems that the  
4 law -- I've always found that the law does -- wants  
5 to do the right and just thing. And it's not up to a  
6 receiver to make a decision as to what the right and  
7 the just thing is. And if the receiver doesn't do  
8 his job, I am sure someone such as Judge Sullivan  
9 will do the right thing --

10 MR. BEGOS: Your Honor --

11 THE COURT: -- as a judge in this matter.  
12 Ms. Shevitz, you want to appear for Mr. Tanaka?

13 MS. SHEVITZ: I will, because I think I have  
14 more information than --

15 THE COURT: Okay.

16 MS. SHEVITZ: -- than everybody.

17 THE COURT: Okay.

18 MR. BEGOS: So, Ms. Shevitz is appearing for  
19 all purposes for Mr. Tanaka in this action, your  
20 Honor?

21 THE COURT: I have no idea. She's appearing  
22 for today for Mr. Tanaka. Apparently she's the one  
23 that helped him write his papers.

24 MR. BEGOS: Your Honor, may I request that  
25 Ms. Shevitz either appear or not speak. If she's  
26 going to appear, then we want to be able to serve her

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2 and we file things electronically. She should not be  
3 permitted to appear and speak today and have her  
4 incarcerated client go on and represent himself  
5 pro se.

6 MS. SHEVITZ: No. I will represent him. I  
7 just want to say this. Mr. Begos has appeared  
8 without appearing in the criminal case and in the SEC  
9 case. He has not intervened in those cases, and they  
10 have spoken relentlessly and repeatedly. Yes.

11 THE COURT: What does that mean?

12 MS. SHEVITZ: That means that I'm trying to  
13 level the playing field a little by expressing  
14 Mr. Tanaka's views, because he's been incarcerated  
15 this whole time and his money has been restrained and  
16 yes, JP Morgan has been holding this since 2005  
17 without letting it go. We submitted a letter from  
18 Bear Stearns. It was issued in 2005, July 2005  
19 stating to one of the investors, we are working with  
20 the U.S. Attorney and the SEC and we are not letting  
21 the money go.

22 THE COURT: Well, I think they had no choice  
23 at that point.

24 MS. SHEVITZ: I think they had -- Well, they  
25 had no choice if they were pleasing the SEC and the  
26 U.S. Attorney.

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THE COURT: Exactly.

MS. SHEVITZ: But everybody has now taken the position not me, not me, not me, but the fact is that the funds have been frozen. We say it's the government. They say it's JP Morgan. And JP Morgan says nothing. We're not paying interest. We're not giving you the money. We're not doing anything. And that's been the status. And we're not paying interest. And the receiver, amazingly, is not holding JP Morgan accountable. In fact, he is asking for fees for JP Morgan.

What's happening in the SEC case is we have filed an opposition to the receiver's request to get fees for JP Morgan on many grounds, including that Lilly Cates, one of the investors, has an action against JP Morgan, Bear Stearns, and says it's in pari delicto. Nobody has commented on that yet. All of this is before Judge Sullivan.

For some reason Judge Sullivan has not required anybody to hold JP Morgan accountable. I think he was misled in 2005.

THE COURT: I don't know. I doubt if Judge Sullivan is misled. I may have been. I'm not going -- I'm sure Judge Sullivan knows what he's doing.



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2 MS. SHEVITZ: I can tell you there is an  
3 investor pool. After the criminal case, shortly when  
4 things woke up here and woke up after the sentencing,  
5 we were still litigating forfeiture, because there  
6 was a forfeiture that was vastly overstated. A  
7 substitute asset forfeiture motion hit my desk and  
8 hit the criminal case shortly after I was appointed  
9 by the Court to represent Vilar on appeal. I looked  
10 at that and said, hey, somebody better do something  
11 or else this is waived. I looked at that and the  
12 bottom line is the judge agreed that he had issued a  
13 forfeiture order of \$36.7 million to high.

14 THE COURT: What was the forfeiture amount?

15 MS. SHEVITZ: Well, it should have been 17  
16 million, but he made it 54 million. But the circuit  
17 has vacated all of that. We're going back for  
18 resentencing in a month. Less than a month.

19 THE COURT: I understand all of that. But  
20 what I would like to know is how much money --

21 MS. SHEVITZ: Okay.

22 THE COURT: -- JP Morgan is holding.

23 MS. SHEVITZ: I'll tell you. There is cash  
24 that has been frozen, about 20, 25 million.

25 THE COURT: There is a big difference between  
26 20 and 25 million.

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MS. SHEVITZ: I'm sorry. Twenty-three million. I'm not sure.

THE COURT: So, it's more than 20 million?

MS. SHEVITZ: Yes, there is more than 20 million.

THE COURT: And other than cash?

MS. SHEVITZ: Other than that there is a number of accounts in the quote "investor accounts". They are house accounts of Amerindo. There are also public securities. Some of them are priced. Some of them are not priced. And we don't know what the receiver has sold, because he got permission to sell some, and they have not given us information. They have frozen us out.

THE COURT: Well, isn't the receiver's report replete with all of this?

MS. SHEVITZ: No. Yes and no. The receiver keeps saying, we don't know what's left. The latest is, we think -- he thinks --

THE COURT: How could he not know what's left? It's his job.

MS. SHEVITZ: Believe me, I know.

MR. BEGOS: There are statements from JP Morgan which lists what's in the accounts. The question is what some of it is worth, and he hasn't

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2       ventured a formal opinion as to what some of this is  
3       worth. Although he has indicated, I don't know if  
4       you want to call it off the record, but not in formal  
5       papers, that at least a subset of the securities  
6       could be worth as much as 40 to \$50 million.

7               MS. SHEVITZ: There is private securities  
8       also. These are companies that Amerindo invested in  
9       at a startup stage. Some of them went public. They  
10      are still sitting in the JP Morgan accounts. We  
11      pointed that out to them, the receiver, JP Morgan and  
12      Judge Sullivan, for instance, a stock called Three  
13      Par Data. That was -- It's still in the account as  
14      an unpriced security. However, in, I think, 2010,  
15      don't hold me to that, please, it was bought by HP, I  
16      believe. It's worth much more than it is. But they  
17      still hold it as an unpriced.

18             THE COURT: Doesn't the receiver owe some  
19      kind of duty to -- to make sure that the accounts  
20      under his control are not being wasted?

21             MS. SHEVITZ: Well, judge, I wish you were  
22      the judge there, because this is precisely what we  
23      have been arguing, and for some reason it's not  
24      happening. The SEC is not requiring that to be done.  
25      In 2011 Judge Swain had the SEC case. And on  
26      September 23rd, 2011 she told the SEC and the U.S.

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2 Attorney to find out what's in the accounts and find  
3 out the investor claims and have Gary Tanaka and  
4 Alberto Vilar help them to do that and come back.  
5 That was 2011.

6 THE COURT: Did it ever happen?

7 MS. SHEVITZ: No. In 2012 the investor  
8 started getting all upset, which I don't blame them.  
9 They went to court and they said, can we speak. Can  
10 we speak. Everybody got in speaking. And so the  
11 defendants had to respond to everybody, and we did as  
12 much as we could. And they -- And Judge Sullivan and  
13 Judge Swain held a joint court meeting with the  
14 criminal case and the SEC case and they said in 2012  
15 to the U.S. Attorney and the SEC, go find out what's  
16 in the accounts. Go find out what the assets are.  
17 Go find out the investor claims and come back in  
18 February of 2012.

19 So, they did produce something. And then we  
20 tried to get a claims process going.

21 MR. BEGOS: That's not accurate, your Honor.  
22 The judge said that Mr. Vilar and Mr. Tanaka could  
23 consent to the release of money to investors and that  
24 at that point there had to be a consent, and  
25 Ms. Shevitz came up with every reason why Vilar and  
26 Tanaka would not consent to the release of money.

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I'm not here to justify what the receiver has done or the U.S. Attorney has done.

THE COURT: All I want to know is how much money JP Morgan has in these accounts and how much money was claimed. I don't mean is claimed by the various stakeholders at this point. I want to know through the Amerindo records as of the date of arrest, according to the Amerindo records, what was owed to each of the investors.

MS. SHEVITZ: Shockingly, judge, the receiver has not looked at the Amerindo records. That's what he said in his latest report, which we have contested. And their position always is, they are in disarray. They are this. They were seized unexpectedly by the government and in the govern --

THE COURT: Well, if the receiver's position is that the Amerindo records are not accurate or that they are in disarray as you say --

MS. SHEVITZ: He hasn't looked at them.

THE COURT: -- then instead of asking for the investors to put forth claims, he should ask them for the last statement --

MS. SHEVITZ: He did.

THE COURT: -- that they got as close to the date of arrest as possible.

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MS. SHEVITZ: He did.

MR. BEGOS: That's what he did. We submitted that.

THE COURT: And what did those statements reflect?

MR. BEGOS: I don't know that anybody has added up what's on those last statements. In some respects the receiver has used those statements. In other respects he rejected those last statements. In the Mayers case, for example, although he said he was using the last statement, which was the statement your Honor used, the 11 million 224, he actually used the 2001 statement for the 11 million 66. For other people they said they didn't have statements, but they said this is what I invested.

THE COURT: Then you can't use those, because that's not appropriate, and he should have gone to the accounts, the Amerindo accounts for those.

MR. BEGOS: Your Honor, I don't disagree.

THE COURT: To me you don't -- this isn't, as I said, this is not a class action. This is a commercial case in which there are records --

MS. SHEVITZ: Yes.

THE COURT: -- that should reflect --

MS. SHEVITZ: And they do.

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THE COURT: -- what is owed.

MS. SHEVITZ: And they --

MR. BEGOS: They should except the records were kept by a company that was a giant fraud.

MS. SHEVITZ: No, it was not a giant fraud, Mr. Begos. Excuse me.

MR. BEGOS: So, we don't know if the records are accurate, but the receiver, certainly to answer your Honor's question, the receiver has represented that he has not looked at the records. What he told Judge Sullivan was to look at those records, to do an audit of those records would cost an excessive amount of money, and there is no guarantee that at the end of that process anybody would be any wiser as to who was owed what.

THE COURT: What is the receiver? Is the receiver an accountant of some sort?

MR. BEGOS: He is an attorney who has experience as a bankruptcy trustee. He was picked by Judge Sullivan.

THE COURT: It's a bankruptcy trustee, which means he's used to taking money and that's it.

MS. SHEVITZ: Yes.

THE COURT: Frankly, this is not appropriate.

MR. BEGOS: Your Honor --

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THE COURT: What we need here is somebody who can be relied on to do an appropriate accounting or at least look at the records.

MS. SHEVITZ: In 2002, when the government did come back to try and respond to the assets and the claims, they did, the U.S. Attorney, Sharon Levin, did use the Amerindo records. She put copies --

THE COURT: I would assume they had to look at the records to make out their criminal case.

MS. SHEVITZ: They did. They didn't for the criminal case exactly. But for this, there is suppose to be an accounting. She said it's up to date. There is more. She told Judge Swain, when Judge Swain was in the case, that yes, we have the records. She used them. The prosecutor used them at sentencing in 2010 and attached account statements, and nobody said they were in disarray.

THE COURT: Were they the account statements for every one of the investors?

MS. SHEVITZ: Yes.

MR. BEGOS: Well --

THE COURT: And where are those account statements?

MR. BEGOS: I believe they are in possession



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of the government. Part of the issue --

THE COURT: I'm sure Judge Sullivan can get them.

MR. BEGOS: Part of the issue, your Honor, what complicates things somewhat is the criminal trial related to a narrow subset of victims. It was victims like the Mayers and a couple of others who invested in this guaranteed fixed rate deposit account as well as Lilly Cates, who is sort of off on her own, and she had \$5 million stolen. But the bulk --

MS. SHEVITZ: There has been no finding of that.

MR. BEGOS: There has been. They are in jail.

THE COURT: Please. Let's move on.

MR. BEGOS: There are other GFRDA investors who submitted claims in the receivership proceeding that weren't part of the criminal trial. There are also investors in what was suppose to be a mutual fund called Amerindo Technology Growth Fund. The Mayers had a small investment in that.

THE COURT: That was the 400,000 plus?

MR. BEGOS: Yes. There are people with, you know, tens of millions of dollars annually invested

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in that mutual fund. That wasn't part of the criminal trial either.

THE COURT: I see. Was that part of the SEC proceeding?

MS. SHEVITZ: Somewhat.

MR. BEGOS: The SEC allegations included that. To date the Court has only entered summary judgment with respect to the investors who were established as victims in the criminal trial. The SEC has moved for a default judgment against the defendants, mostly the corporate defendants with respect to everybody else, but that hasn't been entered yet. So, we have, in terms of -- When your Honor asked --

THE COURT: Well, my assumption then would be that the judgment we're dealing with here is a GRFD is it?

MR. BEGOS: GFRDA.

THE COURT: GFRDA, that account only has 20 some odd million in it, is that correct?

MR. BEGOS: No. The money was all coming. The bulk of the money in assets are in an account that is nominally called Amerindo Technology Growth Fund II.

THE COURT: It includes all of the monies

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from all of the different investments?

MR. BEGOS: Yes. If you look at the statements that are attached to the Jacobson declaration that are part of the motion papers here, the transfers that the defendants are saying were interest payments to the Mayers were transferred out of this Amerindo Technology Growth Fund II account. So, part of the problem is there was no -- there was no separate accounting of the GFRDA money versus the ATGF money. And that's what I understand the question. And I think there should be a straightforward answer. I'm simply trying to explain how there isn't yet a straightforward answer to the question.

THE COURT: Well, it puzzles me because the Feds have had this case since 2005.

MS. SHEVITZ: Yes.

THE COURT: They still haven't gotten their --

MS. SHEVITZ: Yes.

THE COURT: -- their ducks in a row. I don't understand it.

MR. BEGOS: They have not. And I don't -- I don't excuse them. I say -- All I can say is we have been fighting since 2005 to try to get paid. The

1  
2 Federal Government, the U.S. Attorney, really the  
3 U.S. Attorney's Office and the SEC have not forced  
4 payment. But for many, many years, and with respect  
5 to the joint session before Judge Sullivan and Judge  
6 Swain that Ms. Shevitz referred to, what the Court  
7 had clearly said was the only way this frozen money  
8 could be distributed to anybody, is if Vilar and  
9 Tanaka consented. And Vilar and Tanaka steadfastly  
10 refused to consent to any distribution. That's where  
11 it ended.

12 THE COURT: Before that can happen, it seems  
13 like Judge Swain and Judge Sullivan wanted to know  
14 what was there. They would not have just agreed to  
15 allow Vilar, Tanaka to distribute money. I am sure  
16 that both Judge Swain and Judge Sullivan it sounds  
17 like wanted to know what was being held and who had  
18 investments. And it sounds to me like they never got  
19 an answer.

20 MS. SHEVITZ: And still have not.

21 MR. BEGOS: I think that's probably an  
22 accurate statement.

23 MS. SHEVITZ: Yes, and still have not.

24 MR. BEGOS: However, the process --

25 THE COURT: And nothing can be distributed  
26 unless that happens.

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MR. BEGOS: -- the process could have begun --

MS. SHEVITZ: Yes.

MR. BEGOS: -- years earlier if Vilar and Tanaka had consented to it.

THE COURT: I don't understand why it needed their consent --

MR. BEGOS: Because they had --

THE COURT: -- if all the records were in the hands of the Feds.

MR. BEGOS: Because they had appealed their conviction. The Court had --

THE COURT: No. No, that's not what I'm saying. I'm saying, nothing could have happened with or without their consent unless there was an accounting.

MS. SHEVITZ: Yes.

MR. BEGOS: There was essentially a period of limbo. And this gets into the minutia of federal forfeiture law. What the District Court, Judge Sullivan had issued what's called an order of substitute assets saying, including the JP Morgan assets, saying these assets can be forfeited to the federal government. The Justice Department would have a procedure to try to distribute those to

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2 investors.

3 Because of the appeal of the criminal  
4 conviction, because of the issues regarding the  
5 amount of the forfeiture, Judge Sullivan never issued  
6 what's called a final order of forfeiture, which is  
7 what gives the government actual title to the money  
8 and allows them to take possession of the money. And  
9 the government basically said until we got that,  
10 which we're not asking the Court to issue, there is  
11 nothing we can do.

12 THE COURT: Well, that's -- again, you're  
13 just repeating yourself in dealing with the issue of  
14 consent. That's not my concern at this point. My  
15 concern is an accounting basically.

16 MS. SHEVITZ: Yes.

17 THE COURT: What is in these accounts and who  
18 is owed the money according to the records. I don't  
19 understand why the receiver doesn't go after that,  
20 because nothing can be done without that information.  
21 And I think it appropriate that no one gets a  
22 priority here. But I also think it appropriate that  
23 someone figure out what's there and who is owed what.

24 MR. BEGOS: Well, we have argued that the  
25 Mayers are entitled to a priority and the GFRDA  
26 investors are entitled to a priority for various

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reasons.

THE COURT: I'm not willing to go there.

MR. BEGOS: I understand. Your Honor, I have a question though. And I want to answer your Honor's questions. And we're happy to submit the receiver's materials. And as I said before, I have no objection to your Honor contacting Judge Sullivan.

What I'm trying to understand is, I mean, it seems what's -- what's now before the Court is a fairly narrow question of the amount of the Mayers' judgment on the GFRDA claim. I'm not sure how the larger inquiry relates to the amount of their judgment.

THE COURT: I understand your concern. My concern is that I may have made a mistake. I don't want to give the Mayers priority. That's my problem. I don't think it appropriate for them to have a priority over other investors.

MS. SHEVITZ: Judge, in the SEC action right now recently the SEC filed a document objecting to the positions -- a lot of the -- They have put the investors litigating and having to litigate. It's really a mess and expensive and uncalled for. But the SEC has taken the position that the Mayers violated the restraining order knowingly in the

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criminal case by coming here.

Do you have the language here? By coming here and perfecting, I guess the word is perfecting, the judgment.

MR. BURGER: Finally quoting from the government's memo of law. "Finding. The Mayer family contends that their judgment is entitled to priority and distribution due to the judgment lien they allegedly perfected on the receivership assets. The commissioned staff does not believe that the Mayer family has any priority in distribution, because any lien it may have obtained was in violation of this Court's injunction and is therefore invalid or avoidable."

THE COURT: Which court was that? There was an injunction issued by whom?

MR. BURGER: At the time of the purported perfection of the lien, the assets in question were subject to the Court's post-conviction restraining order, which enjoined "all persons and entities having actual knowledge of this order" from encumbering or causing to be pledged, hypothecated or encumbered in any manner --

THE COURT: Which was past 2010.

MR. BEGOS: 2009.



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MS. SHEVITZ: 2009.

THE COURT: This case was started in 2004.

MR. BEGOS: Correct.

MS. SHEVITZ: Yes.

MR. BEGOS: Your Honor, we have obviously disagreed with the SEC's position. I will point out that the U.S. Attorney's Office, which is prosecuting the criminal trial, has told Judge Sullivan that they have no objection to our enforcing our judgment. Judge Sullivan hasn't ruled, and he's modified the restraining order.

THE COURT: This is a 2004 case. This Court stayed these proceedings pending the criminal action.

MR. BURGER: Initially, yes.

THE COURT: Initially.

MS. SHEVITZ: In 2009 there was a restraining order that was unfortunately consented to by prior to defense counsel for Vilar and Tanaka in the criminal case, who we're claiming are ineffective.

THE COURT: Were the investors in front of the Court on that?

MS. SHEVITZ: No, except the Mayers, who came in and wanted their \$150,000. And to get their \$150,000 they and the prosecutor entered into a deal which brought this Court into it to get \$150,000

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2 released from the restraint so they could continue  
3 paying Mr. Begos to litigate this while we couldn't.

4 MR. BEGOS: That's outrageous. I took no fee  
5 out of the \$150,000. It went entirely to the Mayers.

6 MS. SHEVITZ: Okay. They got a special  
7 disposition from a restraining order that they knew  
8 about in 2009. The sentencing actually was in 2010.  
9 So, this was stayed, I believe, until after the  
10 sentencing, except then we were still litigating the  
11 forfeiture. There is a restraining order in effect  
12 in the criminal case since 2009 that we have asked to  
13 be lifted previously but it was not. That,  
14 unfortunately, not only included the "investor  
15 accounts", but it includes accounts that were being  
16 managed by Amerindo that do not belong to them but  
17 belong to a UK pension fund owned by AXA Insurance or  
18 something, a UK entity.

19 The government and Judge Sullivan has also  
20 been told that that is violating UK law and ought to  
21 be released, at least managed, but it's one amount of  
22 money and stocks under JP Morgan's iron control shall  
23 we say. That was part of the reason that talking  
24 about consent to releasing any money back when we're  
25 talking about it in 2011 we A, didn't know what  
26 everybody was claiming. We didn't know what the

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2 government had frozen, because they didn't let the  
3 defendants have any participation in it. We didn't  
4 know where our records were. That's why when you say  
5 Mr. Tanaka knew what interest he paid, well, kind of.  
6 But we didn't have the records. We didn't get them  
7 until the SEC put them in.

8 THE COURT: All I know is this is very  
9 Kafkaesque.

10 MS. SHEVITZ: Yes.

11 THE COURT: The Mayers put, what was it over,  
12 \$11 million --

13 MS. SHEVITZ: Correct.

14 THE COURT: -- into an investment. That was  
15 the principal,, forget interest, back in 2001.

16 MS. SHEVITZ: Right.

17 THE COURT: And they have to beg to get their  
18 money back. And the government, this is America,  
19 won't release the money. And they get \$150,000 so  
20 that they won't be pulpers, but they can't get their  
21 \$11 million back. And then a receiver, who is  
22 feeding off of this money, can't even get it together  
23 to do an accounting.

24 MR. BEGOS: Correct.

25 THE COURT: This is Kafkaesque.

26 MS. SHEVITZ: Believe me, judge, we're caught

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2 in the cross hairs of that. My client has been under  
3 house detention, jail, lost their U.S. business,  
4 which the U.S. Monitor found squeaky clean in 2005.

5 MR. BEGOS: But they are guilty of fraud.

6 THE COURT: I am not going to comment on  
7 Mr. Vilar and Mr. Tanaka. That isn't in front of me.  
8 What is in front of me is the Mayers who have money  
9 clearly --

10 MS. SHEVITZ: Yes.

11 THE COURT: -- that was in this investment  
12 that was suppose to be paid at the latest in 2003 and  
13 can't get their money back.

14 MR. BEGOS: Your Honor, if there is anything  
15 the Court can do to -- to help this process along, I  
16 welcome it. I do -- I do want to though try to limit  
17 this motion. I mean, the motion before the Court I  
18 think relates to a fairly simple issue. I don't mean  
19 to circumscribe the Court's review of everything else  
20 that's going on in the federal case.

21 THE COURT: I'm not going to. It's not my  
22 business frankly. The only thing in front of me is  
23 the Mayers at this point. I do not view this as  
24 equitable in any way as it relates to them. And, in  
25 fact, if the other investors were in front of me, I  
26 would feel the same way.

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2           My only issue is not to give the Mayers a  
3 priority as against any of the other investors. I  
4 could care less about Mr. Vilar, Mr. Tanaka, the  
5 receiver or JP Morgan. My view on JP Morgan is that  
6 they are using the money.

7           MS. SHEVITZ: Yes.

8           THE COURT: Therefore, they should be paying  
9 interest.

10          MS. SHEVITZ: Yes.

11          THE COURT: If the money were segregated and  
12 not touched, then perhaps interest should not be  
13 paid. But when a bank has millions, tens of millions  
14 of dollars, they pay interest if they are using it.  
15 And for them to get fees and pay no interest is to  
16 put it mildly inequitable. So, that's my view on it.  
17 It's not in front of me. It's in front of another  
18 judge. I'm just saying what I see.

19          The fact that a receiver is now here, the  
20 receiver's job is not a receiver in a class action.  
21 I don't know if there is such a thing. Or a lawyer  
22 in a class action. Or even a trustee in bankruptcy  
23 who is used to feeding on the money and giving the  
24 debtors -- the creditors nothing. But the receiver  
25 is there, at least in my view, to do some sort of  
26 accounting, particularly since the records are

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available.

MS. SHEVITZ: Yes.

THE COURT: And that's all I'm interested in. I want to know what money is there and who has claims to the money and according to the records, not according to hearsay, what is owed to each investor.

MR. BEGOS: I think -- I think there, unfortunately, at this point, there is probably not an answer to that question. I think there is -- the receiver has not looked at the Amerindo records and has used a process that he devised to request proofs of claim and documentation, but he's also approved claims without documentation or recommended that the Court approve claims without documentation.

THE COURT: Well, I'm sure the Court will do with it as it will. The Court will try to do justice. As far as I'm concerned, if that was a receiver in front of me, he would get not a penny for his fees and there would be another receiver on the case.

MS. SHEVITZ: Which we asked, your Honor.

MR. BEGOS: I should point out, your Honor --

MS. SHEVITZ: We asked for that.

MR. BEGOS: -- Judge Sullivan heard argument on this whole issue of the interim distribution about

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2 two weeks ago and said at that point that he expected  
3 to be issuing an order on the interim distribution  
4 proposal within a couple of weeks. We're -- we're  
5 expecting an order on that issue any day now. Now,  
6 it may very well not address ultimate questions of  
7 what everybody's claim is and how much money there is  
8 available, but simply say this proposal is fair  
9 enough for interim distribution and work out any  
10 details later.

11 THE COURT: Well, frankly, I am sure Judge  
12 Sullivan is aware of comity, therefore will have to  
13 pay attention to this Court's judgment.

14 MR. BEGOS: We have asked the Court to do  
15 that, your Honor. One of the arguments that we made  
16 to Judge Sullivan and to the receiver was that under  
17 full faith and credit, the Mayers -- the defendants'  
18 liability to the Mayers has been established, and  
19 that's the amount.

20 THE COURT: I will tell you now, I am not  
21 sure what I am going to do in terms of the interest  
22 and whether or not the ultimate judgment amount might  
23 be deducted to some degree. However, I will tell  
24 you, as of the June 2004 date, I stand by that  
25 amount. As of June of 2004, the 11.2 and change was  
26 owed, millions. There might be some deductions from

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2 subsequent amounts paid perhaps, but those may well  
3 be just interest payments. And then that would  
4 effect the interest and not the principal.

5 MS. SHEVITZ: Judge, we agree with that  
6 number. We have always agreed. The problem is, and  
7 one of the problems is now, there was, in  
8 Mr. Tanaka's view, and from what we just found in the  
9 records, there was a payout agreement. By the time  
10 of now, the payout would have been all paid. So,  
11 that's why we can't object -- we're not objecting to  
12 the entire amount. We're objecting to the add ons  
13 that have overtaken the entire case. So --

14 THE COURT: I understand what you're saying.  
15 You're saying the interest amounts and things like  
16 that.

17 MS. SHEVITZ: The interest amounts.

18 THE COURT: As far as I'm concerned, the  
19 interest may be effected but that's it. And the  
20 150,000, it may figure into it, if the interest is  
21 effected. I'm not sure. But as I said, that 11  
22 million and change, it's about a 11 and a quarter  
23 million is absolutely the number as of June of 2004.  
24 The question is whether or not interest is, and I  
25 think that has to be rethought.

26 MR. BEGOS: Can I ask a question and make a



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2 suggestion? To minimize the issue here, I'm happy to  
3 talk to my client. If the Court's concern is that  
4 the Mayers disclosed a million dollars in interest  
5 payments and the defendants are saying it was a  
6 million three, and the issue is how does that -- how  
7 does that difference --

8 THE COURT: Well, the issue becomes -- the  
9 issue becomes whether interest should be, and I'm not  
10 sure if it should be nine percent or if it should be  
11 counted from January or if it should be just the nine  
12 percent from when the judgment was entered and  
13 something other, I'm not sure. I'm not moving off of  
14 the 11 and a quarter as of June.

15 MS. SHEVITZ: But our position is the  
16 defendants have not had use of that money. It has  
17 been --

18 THE COURT: I understand.

19 MS. SHEVITZ: -- frozen from them.

20 THE COURT: They should have had interest  
21 being paid on those accounts by JP Morgan.

22 MS. SHEVITZ: That's what we're saying. And  
23 we a couple of times have contacted JP Morgan and  
24 said as account holders we direct you to sweep the  
25 money into an interest bearing fund. To pay  
26 interest. We have asked the SEC to tell them to do

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that. We asked the U.S. Attorney. We asked frankly Judge Sullivan. And unbelievably -- And investors have complained about that too. I don't know what's going on and why here.

MR. BEGOS: I just want to point out, your Honor --

MS. SHEVITZ: We haven't had the money.

MR. BEGOS: -- on the prejudgment interest question, this is as it relates to the GFRDA, it's a precontract. I understand there is an issue about from when the Court would calculate it.

THE COURT: Yes. The real question becomes whether some interest was paid subsequent to the date that I said interest was owed. That's the real question raised at this point.

MR. BEGOS: And the Mayers in their -- in their summary judgment motion have --

THE COURT: I may have made a mistake frankly.

MR. BEGOS: As your Honor noted, the Mayers also asserted unopposed that there was additional interest due before that date that hasn't been paid.

THE COURT: I understand all of that.

MR. BEGOS: What I do want to just point --

THE COURT: But because I relied on the

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2 June 2004 statement, that was the amount as of that  
3 date. And I'm not sure -- I don't know what the  
4 agreements were. There were no papers from Vilar and  
5 Tanaka. Tanaka now says he wasn't served. I don't  
6 know.

7 MS. SHEVITZ: He was at Terminal Island.

8 THE COURT: I have no idea. There was an  
9 Affidavit of Service.

10 MS. SHEVITZ: Yes, but it went to San  
11 Francisco.

12 MR. BEGOS: What I was trying to suggest with  
13 respect to the interest, if it would make things  
14 easier for the Court, I can talk to my clients with  
15 respect to the numbers that are in the SEC affidavit  
16 and see if they want to fight those numbers. If they  
17 say we'll consent to the Court finding that the  
18 interest payments were whatever the SEC says, a  
19 million three versus a million and change that the  
20 Mayers said, at least that eliminates, and I can't be  
21 sure that there will be a consent to that, but if  
22 there is, then that eliminates one issue as to the  
23 amount of interest that was paid. Because I think  
24 that's really all it is at this point. We said there  
25 was interest paid. They have said that it's a couple  
26 hundred thousand dollars more. We're talking

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about --

THE COURT: That is interest paid and  
accepted --

MS. SHEVITZ: Yes.

THE COURT: -- through 2005.

MR. BEGOS: Through, I think, January of 2005  
is the assertion. What the Mayers said they received  
a million through the end of 2004. And I'm happy to  
talk to them about the 2005 interest. If they want  
to, you know, concede or not oppose the allegation  
that they received that interest, at least then we're  
talking about a 20 some odd million dollar judgment.  
I don't want to have a lot of dispute over a couple  
hundred thousand dollars.

THE COURT: You're also talking about the  
nine percent. And I'm not sure -- I'm not sure the  
dates. I'm not sure that it was paid. I didn't have  
enough facts frankly in front of me. There are other  
facts now. And again there is that whole issue of  
giving the Mayers a priority, which I hesitate to do.

MR. BEGOS: I understand. I understand those  
issues. And I guess I'm simply trying to see if I  
can perhaps resolve one small part of those issues.  
If the Court thinks it's helpful, I'm happy to talk  
to my clients about that. If the Court doesn't think

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2 it helps resolve this, then we can stand on the  
3 papers.

4 I do just want to point out the one argument  
5 Ms. Shevitz just now made and Mr. Burger made  
6 regarding the entitlement to prejudgment interest.  
7 They have made the argument that prejudgment interest  
8 can't be awarded against the defendant on a breach of  
9 contract action unless there is evidence that he  
10 actually had use of the money. And that's just not  
11 the law. The law, the CPLR clearly says prejudgment  
12 interest back to the date of default is mandatory in  
13 a breach of contract case. The Court of Appeals has  
14 said clearly that it doesn't matter whether the  
15 defendant had use of it or not.

16 A couple of cases that Mr. Burger cited  
17 didn't relate to contract actions, concerned the  
18 question whether prejudgment interest is punitive.  
19 Whether you can award prejudgment interest, for  
20 example, on a rent overcharge case when the tenant  
21 has already been awarded treble damages, and the  
22 Court of Appeals says --

23 THE COURT: I understand all of that. The  
24 question becomes, was interest paid, was it accepted,  
25 and then when was the breach and what interest should  
26 be paid as of the date of the breach. So, those are

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issues.

MR. BEGOS: Is your Honor looking for more submission from us on any of those points?

THE COURT: I would like to know, as I said, what I would like to know is how much money there is in the pot and how much money is owed to the investors -- to the investors.

MR. BEGOS: I'm not sure that any of us will be able to answer any of those particular questions, your Honor. We can tell you what the receiver has said. We can tell you what claims have been submitted by claimants. So it's clear, for example, there is a register of all of the people who have submitted claims and there is a total. I don't know 40 or \$60 million. Whether those monies are actually owed, we couldn't tell you. And the accounting that the receiver has done now is by the receiver's own admission, it's not a final accounting. It's attempting to sort of equalize peoples claims for purposes of the interim distribution. For example --

THE COURT: He's dealing with it as though it is a bankruptcy --

MS. SHEVITZ: Yes, it is.

THE COURT: -- which is not the appropriate way to do it.

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2 MS. SHEVITZ: And the SEC is cheerleading  
3 that, because they have a bankruptcy guy in the SEC.  
4 And they keep citing a case called SEC versus Byers,  
5 which is a Ponzi scheme case, which by definition it  
6 was going to be in bankruptcy. This is not that. It  
7 is a solvent entity. The defendants have claims to  
8 management fees. And the receiver, believe it or  
9 not, within a two week period, when he made these  
10 motions recently to set claims and distributions,  
11 changed his analysis on a dime. First he allocated  
12 certain amounts to all the investors, and within a  
13 week, I think a week or two, he came back. I can  
14 give you the document numbers, but I can't give you  
15 the dates, because I'm dealing with those. In  
16 document 355 he sets claims, and they were really  
17 about the amount of the account statements. Although  
18 he collected crazy NAVs, based on non NAVs that were  
19 not in the accounts. Then the interest rates, he set  
20 crazy interest rates as if the fixed deposit  
21 agreements went on into infinity, when actually they  
22 were a one year deal, and the interest rates drop,  
23 which were shown in the accounts, but he didn't look  
24 at them. He did not look at the Amerindo books and  
25 records.

26 THE COURT: Well, I don't know frankly what

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the contracts with each investor were.

MS. SHEVITZ: Right.

THE COURT: So, I'm not going to make any kind of judgment as to that. There may well have been contracts, and there may have been interest amounts that were suppose to be paid. I have no idea.

MS. SHEVITZ: I hear you. Then he changed it. Document 370. He said he's going to reduce a lot of people's amounts, because he's going to equalize it as if it is a bankruptcy. I don't know if he used those words. And he reduced theirs, their amounts.

THE COURT: Referring to the Mayers?

MS. SHEVITZ: Yes. He reduced -- There are five people who testified at trial. Believe it or not, he took all of those five people, each and every one of them, he reduced their amounts. Those were the ones they are supposedly protecting by this whole nine year long criminal case.

So, the second thing pending, in document 370 he's reducing the amounts for all of those and reallocating them somehow. And he still hasn't done an analysis of the private equities, which was the first thing that Judge Sullivan ordered him to do in



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the first receivership order. And we are just  
tearing our hair out.

THE COURT: Look, at this point do I have  
permission to speak to Judge Sullivan?

MR. BEGOS: Yes, your Honor.

MR. BURGER: Yes, your Honor.

THE COURT: Okay. And I would just ask the  
moving parties to order the record and e-file it.

MR. BEGOS: We will.

MS. SHEVITZ: To what? I'm sorry.

THE COURT: Order the record and e-file it.

MR. BEGOS: And can I request as a  
housekeeping matter, either that Ms. Shevitz file a  
Notice of Appearance or that the Court direct her to  
file?

THE COURT: Yes. Absolutely. And give your  
appearance to the reporter as well.

MS. SHEVITZ: Okay.

THE COURT: I'm reserving on this. I just  
don't have enough facts to make a decision.

MR. BEGOS: Should I submit the receiver's  
proposed motion, which probably contains as good  
information as we can get for your Honor.

THE COURT: Yes, I would appreciate it.

MR. BEGOS: Very well.

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MR. BURGER: Thank you, your Honor.

MR. BEGOS: Thank you, your Honor.

MS. SHEVITZ: This says I've been retained as  
an attorney. I'm a pro bono attorney.

THE COURT: Just change it.

MS. SHEVITZ: That's what I am in all of  
this. It's my career.

MR. BEGOS: Your Honor, the receiver's  
motion, should I e-file those or send them in a  
letter to the Court?

THE COURT: I prefer you to e-file them so  
then I'll have easier access to them and it is less  
paper, if you can do it.

MR. BEGOS: I'll see if I can.

THE COURT: If not --

MR. BEGOS: Then do you want courtesy copies  
of the e-filed documents?

THE COURT: You know what, if it's too big,  
don't bother.

MR. BEGOS: Okay. Very well. Thank you.

ooOoo

Certified to be a true and accurate transcript of the  
above-captioned stenographic minutes.

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Lori Ann Sacco, Official Court Reporter